

No. 34933-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,  
Plaintiff-Respondent,

v.

JONATHAN KINSMAN,  
Defendant-Appellant.

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APPELLANT'S REPLY BRIEF

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## **I. REPLY ARGUMENT**

### **A. THE DEFENSE DID NOT ASK THE COURT TO IMPOSE A SSOSA**

The State misrepresents the defendant's sentencing request. The defense asked for a mitigated sentence and set forth at least two mitigating factors in the defendant's sentencing memorandum. RP 28.

### **B. *STATE V. O'DELL*<sup>1</sup> UNQUESTIONABLY NOW ALLOWS OFFENDER-SPECIFIC FACTORS RATHER THAN OFFENSE-SPECIFIC FACTORS TO BE MITIGATING**

It is true that prior to *O'Dell*, the Supreme Court interpreted RCW 9.94A.340 to allow mitigated sentences only when the circumstances of the crime distinguished it from other crimes in the same statutory category. But *O'Dell* marked a significant change in the law. *In Re the PRP of Light-Roth*, No. 75129-8-I, 2017 WL 3473644, at \*1 (Aug. 14, 2017). And, although *O'Dell* did not cite to *State v. Murray*, 128 Wn. App. 718, 722, 116 P.3d 1072 (2005), *O'Dell* unquestionably overruled the statutory interpretation urged by the State and now allows offender-specific factors rather than offense-specific factors to be mitigating.

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<sup>1</sup> *State v. O'Dell*, 183 Wn.2d 680, 353 P.3d 359 (2015).

C. KINSMAN ESTABLISHED MITIGATING CIRCUMSTANCES  
BY A PREPONDERANCE OF THE EVIDENCE

The trial judge appeared to believe that the only basis for departing below the standard range for mental health issues was the strict confines of RCW 9.94A.535(1)(e). He said that “there may be some mental health issues on the part of Mr. Kinsman, don’t go far enough, and the legislature provided that avenue for individuals who simply can’t conform to what they need to be wrong.” Mental health issues alone can be a mitigating factor. Statutory mitigating factors are only illustrative and the Supreme Court has clearly stated that other factors can be used in mitigation. *State v. Ha’mim*, 132 Wn.2d 834, 843, 940 P.2d 633 (1997). Here, the sentencing judge failed to recognize this broad discretion.

The State misrepresents the severity of Kinsman’s mental health and disabilities. Prior to his arrest, Kinsman had been diagnosed with autism, anxiety, depression, epilepsy and a pervasive developmental disorder. He attended WSU for only two semesters. He was fired from a dishwashing job because he could not perform multiple tasks under pressure.

This evidence was sufficient to meet the preponderance of evidence standard. This Court should reverse and require the sentencing judge to apply the facts and the law correctly.

Finally, the State argues that Kinsman's presented "purported" expert opinions were "clearly tainted by sympathy for the Appellant." The State did not challenge the expertise of Kinsman's witnesses in the trial court and presents nothing to suggest that these doctors and mental health professionals were not qualified. There is nothing in the record to suggest that they violated their professional ethics and provided opinions based upon "sympathy" rather than unbiased professional assessments. This Court should disregard these gratuitous comments.

## II. CONCLUSION

This Court must reverse Kinsman's sentence.

DATED this 23rd day of August, 2017.

Respectfully submitted,



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